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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 43

PETER HARISIADES,

Petitioner,

vs.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT THE PORT OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

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INDEX.

Subject Index.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement of the Case	6
Summary of Argument	12
Argument:	
I. The deportation order is invalid because based upon hearings which did not comply with the Administrative Procedure Act and which failed to meet constitutional standards of due process	17
A. The hearings were in violation of Section 5(c) of the Administrative Procedure Act	18
1. The separation of functions of prosecutor and judge is not a "procedural" requirement within the meaning of Section 12 of the Administrative Procedure Act	21
2. Even if the provisions of Section 5(c) are "procedural," the hearings held in this case were not an "agency proceeding" initiated prior to the effective date of those requirements of the Administrative Procedure Act	23
a. The "proceeding" leading to the deportation order was not "initiated" until the lodging of the charge upon which that order was based	23
b. The hearing was a separate "proceeding" in the course of the "case," and that "proceeding" was initiated after the effective date of the Act	25
3. The Emergency Appropriation Act of September 27, 1950, P. L. 843, is not relevant to this determination	28
B. Petitioner's hearing failed to meet constitutional standards of due process of law	29

II. The Act of October 16, 1918 as amended, as applied to petitioner, denies him freedom of speech and assembly guaranteed by the First Amendment, and deprives him of liberty without the due process of law required by the Fifth Amendment to the Constitution 31

A. As an alien who entered the country legally, petitioner is entitled to the protections of the First and Fifth Amendments to the Constitution 31

B. These protections of the Constitution cannot be impaired by the attaching of conditions to the alien's admission and residence which in themselves violate the Constitution 34

C. The Act of October 16, 1918 as amended deprives petitioner of the freedom of speech and assembly guaranteed by the First Amendment 36

D. The Act of October 16, 1918 as amended makes past membership in a proscribed organization conclusive proof of present undesirability, thereby creating an unreasonable standard in violation of the due process clause of the Fifth Amendment 39

E. The Act of June 28, 1940 retrospectively deprives petitioner of his right to remain in the country and therefore denies him due process of law under the Fifth Amendment .. 41

III. The order finding petitioner deportable under the Act of October 16, 1918 as amended by the Act of June 28, 1940, because of past membership in the Communist Party, is invalid, since as applied to petitioner the 1940 Act constitutes an ex post facto law 42

A. The ex post facto prohibition of the Constitution applies to punitive laws and not exclusively to criminal statutes 43

B. Deportation, although technically punishment for a crime, is nonetheless punitive, since, by depriving a person of all opportunity to remain in the United States, it may separate him from family, livelihood, and property... 44

C. As applied to petitioner, the Act of June 28, 1940 is retrospective, since it relates to activities which took place prior to its enactment and seeks to extend indefinitely the time in which deportation proceedings based upon these activities might be initiated..... 47

D. Previous statements of this Court that the ex post facto clause has no application to deportation statutes and that such statutes may operate retrospectively are not controlling..... 49

Conclusion 51

TABLE OF CASES.

American Communication Association v. Douds, 339 U. S. 382, 404, 412 (1950) 14, 38, 39
Baltimore and Potomac R. Co. v. Grant, 98 U. S. 398 (1879) 25
Baumgartner v. United States, 322 U. S. 665 (1944) ... 38
Bridges v. California, 314 U. S. 252 (1940) 33
Bridges v. Wixon, 326 U. S. 135, 147-48, 157-59 (1945) 14, 15, 33, 37, 42, 45
Bugajewitz v. Adams, 228 U. S. 585, 591 (1913) ... 44, 50, 51
Burgess v. Salmon, 97 U. S. 381 (1878) 48
Calder v. Bull, 3 Dall. 386 (1798) 43
Chae Chan Ping v. United States, 130 U. S. 581 (1889) . 36
Chin Low v. United States, 208 U. S. 8 (1908) 31, 32
Cole v. Arkansas, 333 U. S. 196 (1948) 28
Cummings v. Missouri, 4 Wall. 277, 319 (1867) . 14, 15, 41, 44
De Jonge v. Oregon, 299 U. S. 353, 364 (1937) 14, 37
Delgadillo v. Carmichael, 332 U. S. 388, 391 (1947) 45
Del Guercio v. Gabot, 161 F. 2d 559, 561 (C. A. 9th 1947) 15, 42, 45
Dennis v. United States, 341 U. S. 494, 505-10 (1951) . 14, 38
Di Pasquale v. Kamuth, 158 F. 2d 878, 879 (C. A. 2d 1947) 15, 42, 45
Federal Reserve Bank v. Kalin, 77 F. 2d 50 (C. A. 4th 1935) 25
Fong Haw Tan v. Phelan, 333 U. S. 6, 10 (1948) 45
Fong Yue Ting v. United States, 149 U. S. 698, 707-11, 723-24, 728-29, 730, 732, 744, 762 (1893) 32, 33, 44, 46
Frost v. Railroad Commission, 271 U. S. 583, 594 (1926) 35

Garland, Ex parte, 4 Wall. 333, 380 (1867) 15, 41, 44
Garner v. Board of Public Works of Los Angeles, 341 U. S. 716, 723-24 (1951) 16, 37, 49
Geronde v. Board of Supervisors of Elections, 341 U. S. 56 (1951) 37
Gerrard v. Campbell, 81 F. Supp. 752 (N. D. Ill. 1949). 24
Hallowell v. Commons, 239 U. S. 506 (1916) 25
Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, 507-08 (1926) 14, 35
Herndon v. Lowry, 301 U. S. 242, 261-64 (1937) ... 14, 37, 45
Hill v. Texas, 316 U. S. 400 (1942) 30
Johannessen v. United States, 225 U. S. 227 (1912) 50
Johnson v. Eisentrager, 339 U. S. 763 (1950) 36
Jones v. Opelika, 316 U. S. 584, 609 (1942) 37
Jordan v. De George, 341 U. S. 223, 231 (1951) ... 14, 32, 45
Keller v. United States, 213 U. S. 138 (1909) 14, 32, 40
Kessler v. Strecker, 307 U. S. 22 (1939) .15, 16, 41, 42, 43, 48
Kring v. Missouri, 107 U. S. 221, 225-26, 231-34 (1883) 16, 47, 48
Kwock Jan Fat v. White, 253 U. S. 454 (1920) 31, 32
Lem Moon Sing v. United States, 158 U. S. 538, 547 (1895) 32
Lindsey v. Washington, 301 U. S. 397 (1937) 47
Link v. Receivers of Seaboard Air Line Ry. Co., 73 F. 2d 149, 151 (C. A. 4th 1934) 13, 25
Mahler v. Eby, 264 U. S. 32, 38-40 (1924) ... 32, 40, 44, 49, 50
Medley, Ex parte, 134 U. S. 160 (1890) 47
Momand v. Universal Film Exchanges, 172 F. 2d 37 (C. A. 1st 1948) cert. den. 336 U. S. 967 (1949) 24
Morgan v. United States, 304 U. S. 1, 22 (1938) 13, 30
Murphy v. Ramsey, 114 U. S. 15, 43 (1885) 51

Ng Fung Ho v. White, 259 U. S. 276, 284 (1922) 45, 51
Norris v. Alabama, 294 U. S. 587 (1935) 30
Oliver, Re, 333 U. S. 257, 278 (1948) 13, 30
Pierce v. Carskadon, 16 Wall. 234 (1873) 44
Pierce v. Society of Sisters, 268 U. S. 510 (1925) 40
Power Mfg. Co. v. Saunders, 274 U. S. 490 (1927) 35
Schneiderman v. United States, 320 U. S. 118, 148 (1943) 36, 38
Stewart v. Keyes, 295 U. S. 403 (1935) 16, 41, 48
Strauder v. West Virginia, 100 U. S. 303 (1880) 30
Takahashi v. Fish & Game Commission, 334 U. S. 410 (1948) 32
Terminiello v. Chicago, 337 U. S. 1, 4-5 (1949) 38
Terral v. Burke Construction Co., 257 U. S. 529 (1922) 14, 35
Thomas v. Collins, 323 U. S. 516, 530 (1945) 37
Thompson v. United States, 246 U. S. 547, 551 (1918) .. 21
Thompson v. Utah, 170 U. S. 343 (1898) 47
Tiaco v. Forbes, 228 U. S. 549, 556-57 (1913) 32
Tot v. United States, 319 U. S. 463, 467-68 (1943) 14, 40
Truax v. Raich, 239 U. S. 33 (1915) 32
Tumey v. Ohio, 273 U. S. 510, 535 (1927) 13, 30
United Public Workers v. Mitchell, 330 U. S. 75 (1947) 39
United States v. Carolene Products Co., 323 U. S. 18 (1944) 39-40
United States v. Chicago M. St. P. & P. R. Co., 282 U. S. 311, 328-31 (1931) 36
United States v. George Riggs & Co., 203 U. S. 136, 139 (1906) 21
United States v. Lovett, 328 U. S. 303, 316 (1946) 45
United States v. Powers, 307 U. S. 214 (1939) 48

United States v. Stafoff, 260 U. S. 477 (1923) 16, 48
United States ex rel. Eichenlaub v. Shaughnessy, 338 U. S. 521 (1950) 50
United States ex rel. Knauff v. Shaughnessy, 338 U. S. 537, 547, 550 (1950) 46
United States ex rel. Tisi v. Tod, 264 U. S. 131, 133 (1924) 37
United States ex rel. Turner v. Williams, 194 U. S. 279, 292 (1904) 51
Untermyer v. Anderson, 276 U. S. 440 (1928) 41
West Virginia Board of Education v. Barnette, 319 U. S. 624, 642 (1943) 39
Western Union Tel. Co. v. Foster, 247 U. S. 105, 114 (1918) 35
Western Union Tel. Co. v. Kansas, 216 U. S. 1 (1910) .. 35
Williams v. United States, 341 U. S. 97, 100 (1951) 45
Wong Wing v. United States, 163 U. S. 228, 238 (1896) 32
Wong Yang Sung v. McGrath, 339 U. S. 33, 36-45, 45-46, 50-51 (1950) 10, 13, 15, 19, 21, 23, 26, 29, 31, 45
Yamataya v. Fisher, 189 U. S. 86, 100-01 (1903) 46
Yanish v. Barber, 181 F. 2d 492 (C. A. 9th 1950) 21
Yick Wo v. Hopkins, 118 U. S. 356 (1886) 32
Yu Cong Ed v. Trinidad, 271 U. S. 500 (1926) 40

UNITED STATES CONSTITUTION.

Article I, Section 9, Clause 3 43
Article I, Section 10 43
First Amendment 13
Fifth Amendment 13, 14, 37, 40, 41

UNITED STATES STATUTES.

Act of October 16, 1918 (40 Stat. 1012), as amended by the Act of June 5, 1920 (41 Stat. 1008), as further amended by the Act of June 28, 1940 (54 Stat. 673), 8 U. S. C. § 137(c), (d), (e), and (g) 4, 14, 15, 16, 31, 36, 37, 39, 41, 42, 47, 48
Section 1(c) 4
Section 1(d) 4
Section 1(e) 4
Section 2 5
Administrative Procedure Act (60 Stat. 237), 5 U. S. C. §§ 1001 et seq. 5, 12, 13, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30
Section 3(b) 27
Section 3(c) 22
Section 4(b) 22
Section 5(b) 5, 22
Section 5(c) 5, 12, 18, 19, 22, 23, 27, 28
Section 6(a) 5, 27
Section 6(b) 5, 27
Section 6(c) 5, 27
Section 7 ..... 5, 27, 28
Section 8 ..... 5, 27, 28
Section 9(b) 27
Section 10(a) 22
Section 10(e) 22
Section 11 ..... 5, 19
Section 12 ..... 5, 12, 19, 20, 21, 22, 23, 24, 25, 26
Emergency Appropriation Act of September 27, 1950, Public Law 843 28
Internal Security Act of 1950, September 23, 1950, Public Law 831 11
Act of May 10, 1920 (41 Stat. 217) 50
Espionage Act of 1917 (40 Stat. 217) 49
Selective Service Act of 1917 (40 Stat. 76) 49

MISCELLANEOUS.

Cooley, Constitutional Limitations, Vol. I (8th ed. 1927) 44, 48

Federal Rules of Civil Procedure:
Rule 15(c) 24
Rule 86 ..... 25, 26
Rule 86(a) 13, 25
Rule 86(b) 25

Note, In re Harry Bridges, 52 Yale L. J. 108, 109-10 (1942) 42

Legislative History, Administrative Procedure Act, S. Doc. 248, 79th Cong. 2d Sess. 20, 21, 26

H. Rep. 1980, 79th Cong. 2d Sess. 20

H. Rep. 2683, 79th Cong. 3d Sess. 38

S. Doc. 752, 79th Cong. 1st Sess. 20

86 Cong. Rec. 9031-32, 76th Cong. 3d Sess., June 22, 1940 38

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 987-94) is reported at 187 F. 2d 137 (C. A. 2d 1951). The opinions of the District Court (R. 875-934 and R. 966-79) are reported at 90 F. Supp. 397 (S. D. N. Y. 1950) and 90 F. Supp. 431 (S. D. N. Y. 1950) respectively.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 6, 1951 (R. 995). The petition for a writ of certiorari was filed on May 3, 1951. It was granted on October 8, 1951. 72 S. Ct. 26. Jurisdiction in this Court is conferred by 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

I.

1. Should the hearings on petitioner's deportability have been held in conformity with those provisions of the Administrative Procedure Act which require that the prosecuting and adjudicating functions be separated?

2. Is the separation of prosecuting and adjudicating functions a procedural requirement of the Administrative Procedure Act and therefore not mandatory as to a proceeding initiated prior to the effective date of those provisions of the Act?

3. Do the hearings on petitioner's deportability constitute a "proceeding" initiated prior to the effective date of the separation of function provisions of the Administrative Procedure Act?

4. Does the Emergency Appropriation Act of 1950, authorizing deportation proceedings without regard to certain sections of the Administrative Procedure Act, have any application to petitioner, whose hearings terminated in 1948?

5. Does a hearing in which the same official serves as prosecutor and as presiding officer and writes the agency opinions constitute a fair hearing and due process of law?

II.

1. Does the Act of October 16, 1918 as amended, by making past membership in certain organizations a mandatory basis for deportation, deprive petitioner of his rights to freedom of speech and assembly guaranteed by the First Amendment?

2. Does the statutory presumption in the Act of October 16, 1918 as amended that every alien who has ever been a member of a proscribed organization is presently undesirable measure up to the requirements of due process of law?

3. May an alien's rights to the protections of the First and Fifth Amendments be impaired by the imposition of conditions upon admission to and residence in the United States?

4. May petitioner, consistently with due process of law, be retrospectively deprived of a right to remain in this country which vested prior to the passage of the Act under which his deportation is ordered?

III.

Is the Act of June 28, 1940, providing for deportation of aliens by reason of past membership in any proscribed organization, an *ex post facto* law as applied to petitioner, whose membership in the Communist Party terminated approximately eight months before that Act was passed?

STATUTES INVOLVED.

Deportation.

The Act of October 16, 1918 (40 Stat. 1012), as amended by the Act of June 5, 1920 (41 Stat. 1008), as further amended by the Act of June 28, 1940 (54 Stat. 673).

Section 1 of the Act of October 16, 1918, as amended by the Act of June 5, 1920, as further amended by the Act of June 28, 1940, insofar as pertinent here, provides that:

> Any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:
>
> (c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, * * *.
>
> (d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, * * * advising, advocating, or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, * * *.
>
> (e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution,

publication, issue, or display, any written or printed matter of the character described in paragraph (d).

The above provisions of Section 1 are embodied in 8 U. S. C. § 137 (c), (d) and (e).

Prior to the June 28, 1940 amendment, Section 2 of the Act of October 16, 1918, as amended by the Act of June 5, 1920 provided that:

> Any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in this section shall, upon the warrant of the Secretary of Labor, be taken into custody and deported . . .

Section 2 was amended by Section 23(b) of the Act of June 28, 1940 (The Alien Registration Act of 1940) to read as follows:

> Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1 of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported . . .

In its amended form Section 2 is embodied in 8 U. S. C. § 137 (g).

Administrative Procedure Act.

The Administrative Procedure Act (60 Stat. 237), approved June 11, 1946, 5 U. S. C. §§ 1001, *et seq.*

The sections here pertinent, Sections 5, 7, 8, 11, and 12, are set out in the Petition for a Writ of Certiorari, at pp. 8-12.

STATEMENT OF THE CASE.

Petitioner's Personal History.

Petitioner, a Greek national, entered this country on March 7, 1916 as a thirteen-year-old boy accompanied by his father (R. 21, 104-05). His admission to the United States at that time was for permanent residence (R. 127, 803), and he has resided here ever since (R. 21-22). Petitioner worked at various times in different jobs, including water boy for the Illinois Central Railroad (R. 23), machinist's helper, machinist, waiter (R. 123), textile worker (R. 23-24), and eventually editor of the Greek American Tribune (R. 101). In addition to the name Harisiades, petitioner has employed, at various times, the name Hatzilias or Hadjielias (his original name when he came from Greece), Hagelias, and Harrison (R. 13, 16-18, 47, 105). From at least 1943, when first questioned in New York by the Immigration and Naturalization Service, he has used the name Peter or Panos Harisiades (R. 47), by which he is now known.

Petitioner joined the Workers (Communist) Party about 1925 in Boston (R. 27) and continued his membership until late 1939, when he was dropped as a member because of his non-citizenship (R. 46, 850).

Petitioner was arrested and convicted a number of times in Massachusetts for strike activities, but the convictions were reversed in the appellate courts (R. 23, 24). Later in West Virginia he was arrested in connection with an unemployed demonstration but was released without trial (R. 24).

At the time of one of his arrests in Massachusetts in 1930, petitioner was interviewed by representatives of the Immigration and Naturalization Service. He admitted that

he was a member of the Communist Party and that he was then a section organizer for the Party (R. 16, 18, 122-23). Apparently as a result of this statement, a warrant was issued by the Immigration and Naturalization Service for petitioner's arrest. The warrant, dated April 12, 1930, charged petitioner with being a member of or affiliated with an organization that teaches or advocates the overthrow of the government by force or violence. The warrant was not served upon petitioner until May 2, 1946 (R. 120, 126). The Immigration and Naturalization Service asserts, in explanation of the delay, that it could not locate petitioner (R. 16-18). Petitioner registered under the Selective Service Act and under the Alien Registration Act (R. 51). He applied for naturalization in 1944 in Brooklyn (R. 19). He was questioned by the Immigration and Naturalization Service in June of 1943, apparently in connection with the 1930 warrant (R. 17).

Petitioner settled down to live in New York and Brooklyn in 1933 (R. 25). He married his present wife, a citizen of the United States, on September 15, 1937 (R. 49). Of this marriage two children have been born, Irene on August 5, 1939 and George on October 9, 1944. Petitioner is the sole support of the family and is presently living with his family in Brooklyn (R. 18, 50, 193).

Petitioner's activities in the Communist Party during the period 1925 to 1939 included service as branch executive committeeman, as district organizer, and as section organizer (R. 29-30). Later he became a member and Secretary of the Greek Bureau of the Communist Party (R. 30) and editor of its Greek language newspaper, "Empros" (R. 30, 31). Since 1939 petitioner has had no official connection with the Communist Party. He testified that while not a member, he still had the same ideas insofar as philosophy and general principles were concerned (R. 47).

Deportation Hearings.

The original deportation hearings were conducted on October 16, 1946 and on January 30 and 31, 1947 (R. 13, 53, 84). Gilbert Zimmermann, an inspector of the Immigration and Naturalization Service, acted both as presiding inspector and as examining inspector at these hearings. In the course of the hearings three charges, in addition to the charge stated in the arrest warrant, were lodged against petitioner: (1) past belief, advocacy, or teaching of the overthrow by force or violence of the United States Government, (2) past membership in an organization that believed in, advised, advocated, or taught the overthrow by force or violence of the United States Government, and (3) past affiliation with an organization that believed in, advised, advocated, or taught the overthrow by force or violence of the United States Government (R. 48).

In testifying at these hearings, petitioner denied that he had ever advocated overthrow of the government by force or violence (R. 33, 107-09) and asserted that he had never understood the Communist Party to advocate such overthrow (R. 39, 93, 107-09). He also asserted that he regarded the United States as his home and that he would fight for the United States (R. 94). He said that he was established here and that deportation would ruin him and his family (R. 118). The opinion of the Assistant Commissioner of Immigration and Naturalization stated that the record contained no adverse evidence as to petitioner's behavior as a father and husband (R. 853).

The proposed findings of Inspector Zimmermann sustained the three new charges but concluded that the petitioner was not subject to deportation by reason of present membership in a proscribed organization (R. 191-92).

Counsel for petitioner filed exceptions (R. 194). There-

after, on August 5, 1947, the Commissioner of Immigration and Naturalization ordered that the hearings be reopened for the purpose of authenticating documents and lodging two additional charges (R., 197). One of these charges was substantially the same as the second and third charges lodged at the 1946-47 hearings. The second new charge was that petitioner had been a member of an organization that wrote, circulated, or distributed or caused to be written, circulated, or distributed written and printed matter, advising, advocating, and teaching the overthrow by force or violence of the United States Government (R. 197). The reopened hearing was originally scheduled for September 22, 1947 (R. 199). At the request of petitioner's counsel, a continuance to October 15, 1947 was granted. Counsel was informed at that time that a new presiding inspector and a new examining inspector were to participate in the reopened hearing (R. 199). Petitioner's counsel objected to the designation of these new officials on several grounds, including possible prejudice, and requested that the reopened hearing be conducted by Inspector Zimmerman (R. 196, 203).

The reopened hearings were held on February 18 and 19, 1948 and March 9 and 10, 1948 (R. 204, 276, 355, 401). Inspector Zimmerman served as presiding inspector and Inspector Roberts as examining inspector (R. 204, 276, 344, 401). At the conclusion of these hearings Inspector Zimmerman filed an additional opinion (R. 529-805). He sustained the three charges lodged at the 1946-47 hearings and the two additional charges lodged in connection with the reopened hearings, but he again found that the charges contained in the original warrant had not been sustained (R. 802-05). These conclusions were affirmed by the Assistant Commissioner of Immigration and Naturalization on December 16, 1948 (R. 850, 852).

On May 13, 1949 the Board of Immigration Appeals sus-

tained the order of deportation on two grounds: (1) past membership in an organization which advocated the overthrow of the United States Government by force or violence, and (2) past membership in an organization which distributed printed matter which so advocated (R. 873). The Board of Immigration Appeals specifically stated, "We find that the evidence of record does not establish that the respondent personally believed in or advocated the overthrow of the Government of the United States by force or violence. Since the respondent has admitted membership in the Communist Party of the United States, we believe that the grounds of deportation based on affiliation are, at the very best, superfluous" (R. 873).

During all these hearings, petitioner was permitted to remain at large on his own recognizance (R. 52, 83, 119, 520, 964). The petitioner was taken into custody on May 20, 1949 (R. 875).

Court Proceedings.

An application for review under the Administrative Procedure Act was denied on July 1, 1949 by Judge Bondy, who suggested that the proper remedy was habeas corpus (R. 882). A petition for writ of habeas corpus was filed on that date (R. 4, 9) and the writ issued (R. 3). The writ was dismissed by Judge Vincent L. Leibell on February 20, 1950 (R. 935). The opinion of Judge Leibell, which discussed all the issues, stated that the writ was dismissed on the merits (R. 875, 934). Petitioner's counsel filed a notice of appeal on the same day (R. 996).

On that same date the United States Supreme Court decided the case of *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), and in the light of that opinion petitioner's counsel moved to amend the petition for a writ of habeas corpus in order to allege that the proceedings against

petitioner were not conducted in conformity with the provisions of the Administrative Procedure Act (R. 938, 949). This motion was opposed by the United States Attorney on the ground that the appeal taken by petitioner deprived the trial court of jurisdiction (R. 950-51). Petitioner thereupon asked for leave to withdraw the appeal (R. 953-54). On April 11, 1950, both motions were denied by Judge Leibell (R. 980-81). In his opinion the judge found that the Administrative Procedure Act was not applicable because the proceedings had been initiated prior to the Act's adoption (R. 966-79).

Petitioner's appeals from the dismissal of the writ and from the denial of its motions to amend the writ and to withdraw the appeal were consolidated (R. 982-83). The consolidated appeal was decided by the Court of Appeals for the Second Circuit on February 6, 1951 (R. 987-94). The order of deportation was upheld on the merits, and the order denying leave to amend the petition for writ of habeas corpus was sustained. The trial court's dismissal of the writ was reversed only because, under the Internal Security Act of 1950 (Public Law 831, 81st Cong., 2nd Sess.), petitioner was entitled to choose the country to which he was to be deported, and the Attorney General was required to find that deportation to a particular country would not subject petitioner to physical persecution (R. 993-94).

SUMMARY OF ARGUMENT.

I.

The order of deportation entered against petitioner is invalid because the hearings on which it is based were not held in conformity with the provisions of the Administrative Procedure Act. Those hearings were all held more than three months after the approval of the Administrative Procedure Act and consequently, as specified in Section 12, the requirements of Section 5(c) with respect to the separation of prosecuting and adjudicating functions were in effect. The same official who presented some of the charges and evidence against petitioner also acted as the presiding officer and prepared the initial findings and opinions for the Immigration and Naturalization Service. Thus the prosecuting and adjudicating functions were merged in violation of Section 5(c) of the Act.

The provision of Section 12 exempting pending proceedings from "procedural requirements" of the Act is not applicable, for the requirement of Section 5(c) that prosecuting and adjudicating functions be separated is not a procedural requirement. The structure of the Act clearly differentiates those subsections dealing with procedure from Section 5(c), which is a basic requirement intended to assure the impartiality of the presiding officer. It has to do with fundamentals and not with forms.

Even if the provisions of Section 5(c) are procedural, the hearings held in petitioner's case were not a "proceeding" which was "initiated" prior to the effective date of those requirements. The proceeding cannot properly be considered as having been initiated either by the issuance of the warrant in 1930 or by its service in May of 1946,

since neither as issued nor as served did it contain any charge on which the final deportation order was based.

In any event, it is not reasonable to consider all the steps taken by the Immigration and Naturalization Service, from the formulation of charges to the final deportation order, as constituting a single "proceeding" as that term is used in Section 12. The term "proceeding" is not used in the Act where the drafters had in mind the over-all continuity of events from the inception of action to final order. Instead they used the term "case" for that purpose, thus envisaging various "proceedings" as steps in the handling of a "case." Furthermore, the usual rule is that statutes having to do with practice and procedure apply both to pending actions and those subsequently instituted. *Link* v. *Receivers of Seaboard Air Line Ry. Co.*, 73 F. 2d 149, 151 (C. A. 4th 1934); cf: Rule 86(a), Federal Rules of Civil Procedure.

Regardless of whether the Administrative Procedure Act applied, the hearings accorded petitioner failed to meet constitutional standards of due process of law because of the merger in a single official of prosecuting and adjudicating functions. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50-51 (1950). Cf. *Tumey* v. *Ohio*, 273 U. S. 510 (1927); *Re Oliver*, 333 U. S. 257, 278 (1948); *Morgan* v. *United States*, 304 U. S. 1, 22 (1938).

II.

The Act of October 16, 1918, as amended denies petitioner freedom of speech and assembly and deprives him of liberty without due process of law. As an alien who entered the country legally, petitioner is entitled to all the protections of the First and Fifth Amendments to the Constitution. The mere fact that Congress legislates with regard to aliens does not completely free it from constitutional control.

Keller v. *United States*, 213 U. S. 138 (1909); *Jordan* v. *DeGeorge*, 341 U. S. 223 (1951); *Bridges* v. *Wixon*, 326 U. S. 135, 148 (1945).

These constitutional protections cannot be impaired by attaching conditions to the alien's admission to and residence in the United States which themselves violate the Constitution. Cf. *Hanover Fire Ins. Co.* v. *Carr*, 272 U. S. 494, 507-08 (1926); *Terral* v. *Burke Construction Co.*, 257 U. S. 529 (1922).

Petitioner's right to freedom of speech and assembly was impaired by the Act of October 16, 1918 as amended, in that it permitted him peaceably to assemble only at the risk of deportation. The deportation statutes conclusively presume that every alien who has ever been a member of a prescribed organization, however briefly or long ago, is such a source of danger that he must be deported, regardless of his past or present personal thoughts and advocacy. The right of peaceable assembly cannot thus be abridged. *DeJonge* v. *Oregon*, 299 U. S. 353, 364 (1937); *Herndon* v. *Lowry*, 301 U. S. 242 (1937). There is no justification for such a restraint of an individual's rights of free speech and assembly under the clear and present danger test. Cf. *American Communication Association* v. *Douds*, 339 U. S. 382, 412 (1950); *Dennis* v. *United States*, 341 U. S. 494, 505-10 (1951).

These statutes bear no reasonable relationship to the legitimate ends which Congress may seek and therefore violate the due process clause of the Fifth Amendment. There is here no proper connection between the fact of past membership and the conclusive statutory presumption of present undesirability. Cf. *Tot* v. *United States*, 319 U. S. 463, 467-68 (1943); *Cummings* v. *Missouri*, 4 Wall. 277, 319 (1867).

The Act of June 28, 1940, passed aproximately eight

months after petitioner's membership in the Communist Party ceased, retrospectively deprives him of a vested right to remain in the country and therefore denies him due process of law. Cf. *Di Pasquale* v. *Kamuth*, 158 F. 2d 878, 879 (C. A. 2d 1947); *Del Guercio* v. *Gabot*, 161 F. 2d 559 (C. A. 9th 1947).

III.

As applied to petitioner, the Act of June 28, 1940, making past membership in a proscribed organization a mandatory basis for deportation, is invalid since it constitutes an *ex post facto* law. Prior to the 1940 amendment the law had been construed as providing for deportation by reason of present membership only. *Kessler* v. *Strecker*, 307 U. S. 22 (1939). Petitioner's membership in the Communist Party terminated in October 1939, approximately eight months prior to the passage of the Act of June 28, 1940.

The *ex post facto* prohibition of the Constitution applies to punitive laws and not exclusively to criminal statutes. *Cummings* v. *Missouri*, 4 Wall. 277 (1867); *Ex parte Garland*, 4 Wall. 333 (1867). This Court has recently recognized the punitive nature of deportation. *Bridges* v. *Wixon*, 326 U. S. 135, 147 (1945); *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50 (1950). The position taken by the Government, that deportation is not punishment, rests on the argument that since the power to deport aliens is absolute and unqualified, the exercise of that power is nothing more than the termination of a revocable license to remain. Hardship to the alien is purely incidental. But whether or not the power is absolute, the manner of its incidence upon individuals is what makes it punitive.

The Act of June 28, 1940, as applied to petitioner, is retrospective, since it relates to activities which took place

prior to its enactment and seeks to extend indefinitely the time in which deportation proceedings based upon those activities might be initiated. *Kessler* v. *Strecker*, 307 U. S. 22 (1939), held that termination of membership in a proscribed organization barred deportation under existing law. Consequently, under that decision, the government had to take action while the alien was still a member of such an organization. The Act of June 28, 1940, was intended to remove that time limitation and to make it possible for the government to take action to deport at any time, whether during the alien's membership or after that membership had terminated. In petitioner's case, there is clearly a hiatus between the termination of his membership and the June 28, 1940 amendment. In this respect, therefore, the 1940 Act is *ex post facto* in the same fashion as a statute which, by extending the statute of limitations, attempts to revive prosecutions already barred. Cf. *Kring* v. *Missouri*, 107 U. S. 221 (1883); *Stewart* v. *Keyes*, 295 U. S. 403 (1935); *United States* v. *Stafoff*, 260 U. S. 477 (1923). The hiatus distinguishes this case from *Gatmer* v. *Board of Public Works of Los Angeles*, 341 U. S. 716 (1951).

Previous statements of this Court that the *ex post facto* clause does not apply to deportation statutes and that such statutes may operate retrospectively are not controlling. The statutes involved in the previous cases, as interpreted by this Court, did not have retrospective effect.

ARGUMENT.

I.

THE DEPORTATION ORDER IS INVALID BECAUSE BASED UPON HEARINGS WHICH DID NOT COMPLY WITH THE ADMINISTRATIVE PROCEDURE ACT AND WHICH FAILED TO MEET CONSTITUTIONAL STANDARDS OF DUE PROCESS.

The original warrant for arrest, based on a single charge, was issued by the Immigration and Naturalization Service on April 12, 1930 (R. 120, 126). It was served on petitioner on May 2, 1946, sixteen years after issuance (R. 126).

The Administrative Procedure Act was approved June 11, 1946, to take effect, with certain exceptions, three months thereafter, on September 11, 1946. 5 U. S. C. §§ 1001 *et seq.*

Hearings on the petitioner's case were first conducted by the Immigration and Naturalization Service on October 15, 1946 and on January 30 and 31, 1947 (R. 13, 53, 84). Gilbert Zimmerman, an inspector of the Service, was both the examining inspector and the presiding inspector: he presented the charges and evidence against petitioner and presided over the hearings. Subsequently he prepared the proposed findings. At these hearings, for the first time, three new charges were lodged (R. 48). The proposed findings sustained these charges but dismissed the charge stated in the sixteen-year-old warrant (R. 191-92).

The Service later ordered the hearings reopened, and further hearings were held in February and March of 1948. Inspector Zimmerman, who originally served both as prosecutor and presiding officer, continued to act as presiding inspector; another official acted as examining inspector (R.

204, 276, 344, 401). The order reopening the hearings contained two additional charges (R. 197).

At the conclusion of the reopened hearings Inspector Zimmerman filed another opinion, sustaining the three charges lodged at the 1946-47 hearings and the two charges lodged just prior to the 1948 hearings, but again finding that the charge in the original warrant had not been established (R. 528, 803-05). The Board of Immigration Appeals eliminated three charges but sustained deportation on two of the charges lodged for the first time in 1946 and thereafter (R. 873).

Thus petitioner was ordered deported on the basis of proceedings in which the same individual presented the charges and evidence against him and acted as presiding officer at the 1946-47 hearings, presided at the 1948 hearings, and prepared the initial findings and the opinion for the Immigration and Naturalization Service. In short, the prosecuting and adjudicating functions were merged: the official who presided also prosecuted and drafted the initial agency opinion.

A.

The Hearings Were In Violation of Section 5(c) of the Administrative Procedure Act.

There is no dispute that if the Administrative Procedure Act applied to petitioner's case, the hearings were in violation of the Act. Section 5(c) of the Act, among other provisions, forbids an officer engaged in prosecuting functions in any case from participating or advising in the decision or recommended decision. Here Inspector Zimmerman did so participate.

The reason is that during the years 1946-48, when the hearings were held, the Immigration and Naturalization Service took the position that deportation proceedings were

not covered by the Administrative Procedure Act. The Service clung to that view until this Court ruled otherwise. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950).

Thereafter, the Service contended that the Administrative Procedure Act did not apply to this case for a different reason, namely, the language of the concluding sentence of Section 12:

> This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

Since the hearings of October 15, 1946 and January 30 and 31, 1947 were held more than three months after the approval of the Act, the requirements of Section 5(c) with respect to separation of functions were in effect. Since the hearings of February and March of 1948 were held more than one year after approval of the Act, the requirements of Section 11 with respect to the manner of appointment of examiners were in effect. No steps were taken by the Service to comply with any of these requirements, apparently on the ground that they are "procedural" and consequently not mandatory with respect to petitioner's case, a proceeding allegedly "initiated" prior to the effective date of the Act.

This view, however, presents two important problems: (1) which of the requirements of the Act are "procedural" within the meaning of this exemption? and (2) when was the "agency proceeding" in the present case "initiated"?

In considering these questions, the Congressional purpose in enacting the Administrative Procedure Act and

in particular the stated purpose of Section 12 are of considerable significance.

With respect to the general purpose of the Act, Senator McCarran, reporting for the Committee on the Judiciary, said in the Senate on March 12, 1946:

> Mr. President, Calendar No. 758, Senate Bill 7, the purpose of which is to improve the administration of justice by prescribing fair administrative procedure, is a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government. It is designed to provide guarantees of due process in administrative procedure. Legislative History, Administrative Procedure Act, S. Doc. 248, 79th Cong. 2d Sess., at page 298.

The Senator concluded his presentation as follows:

> By enacting this bill, the Congress—expressing the will of the people—will be laying down for the guidance of all branches of the Government, and all private interests in the country, a policy respecting the minimum requirements of fair administrative procedure. *Ibid.*, at page 327.

And as a guide to the courts the Senate and House Committee reports contained virtually identical statements:

> It will be the duty of reviewing courts to prevent the avoidance of the requirements of the bill by any manner or form of indirection, * * * S. Rep. 752, 79th Cong. 1st Sess., reprinted in Legislative History, Administrative Procedure Act, S. Doc. 248, 79th Cong. 2d Sess., at page 217. See H. Rep. 1980, 79th Cong. 2d Sess., reprinted, *ibid*, at page 278.

With respect to that portion of Section 12 here involved, Mr. Walter, chairman of the subcommittee of the House Committee on the Judiciary, which was responsible for the bill, stated:

> The staggered effective date provision has been

thought necessary in order to give administrative agencies every opportunity to prepare fully. Legislative History, Administrative Procedure Act, S. Doc. 248, 79th Cong. 2d Sess., at page 372.

In the present case the Immigration and Naturalization Service had ample opportunity to prepare fully for compliance with the Act. The Service simply failed to act because of its erroneous view that deportation proceedings were not covered at all. After the decision in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), it proceeded quite promptly to comply. See *Yanish* v. *Barber*, 181 F. (2d) 492 (C. A. 9th 1950).

1. The Separation of Functions of Prosecutor and Judge Is Not a "Procedural" Requirement Within the Meaning of Section 12 of the Administrative Procedure Act.

Section 12 exempts pending proceedings from the Act's "procedural" requirements. The Court of Appeals concluded that the word "procedural" had no particular significance and that Section 12 was therefore to be read as declaring that "no provision of the Act was to apply to any proceeding commenced before the Act became effective" (R. 989). But the intent of Congress is to be ascertained primarily from the words employed, and where reasonably intelligible and plain that language must be accepted without modification: *Thompson* v. *United States*, 246 U. S. 547, 551 (1918); *United States* v. *George Riggs & Co.*, 203 U. S. 136, 139 (1906).

Moreover, the interpretation thus given Section 12 is demonstrably unreasonable. According to the Court of Appeals, the Act was not to apply to any matter pending at any stage at the time the Act became effective. But surely, as to a matter on which an agency decision was pending on September 11, 1946 (the effective date of the Act), Congress did not intend, by the disputed language

of Section 12, to declare that the final opinion or order when issued would not have to be published, as required by Section 3(c). Nor did it intend that a party aggrieved by the order would not have the right of judicial review guaranteed by Section 10(a), or that the reviewing court would not be required to accord the scope of review provided in Section 10(e).

Courts are not free to solve troublesome problems of interpretation by eliminating statutory language. Their obligation in this instance is to seek out the distinction intended by Congress in exempting certain proceedings solely with respect to "procedural" requirements. While it is not now necessary to determine all of the provisions falling on one side of that line or the other, it is reasonably clear that the separation of prosecution and adjudication is one requirement which is not "procedural."

Section 4 of the Act (Rule Making) contains a subsection (b), specifically designated "Procedures"; Section 5 (Adjudication) contains a subsection (b), specifically designated "Procedure." Sharply distinguished, in the structure of the Act, is subsection (c) of Section 5, separately dealing with "Separation of Functions."

The distinction, moreover, is inherent in the Act's subject matter. Certain of the provisions deal merely with matters of form and manners of proceeding. Section 5(c), however, deals with provisions calculated to assure the impartiality of the presiding officer and the absence of any influence, conscious or otherwise, which might arise from a concurrent exercise of prosecuting functions or from that officer's being subject to the direction of any official with prosecuting functions. These concern not merely *how* the hearing shall proceed or *how* the agency functions shall be performed, but *who* shall make the agency decision and what assurance there shall be that the

deciding officer is impartial. Clearly these provisions have to do with fundamentals and not with forms.

The most reasonable interpretation of the word "procedural" would exclude from its coverage the requirement of separation of functions under Section 5(c). This conclusion is reenforced by the judicial canon which calls for that construction of a statute which will preserve its constitutionality from doubt. Cf. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50-51 (1950). If considerations of constitutionality contributed, as they did, to an interpretation finding that deportation cases were not exempt from the Administrative Procedure Act, they ought to contribute equally to the conclusion that provisions assuring an impartial tribunal are not "procedural" within the meaning of Section 12.

2. Even If the Provisions of Section 5(c) Are "Procedural," the Hearings Held In This Case Were Not An "Agency Proceeding" Initiated Prior to the Effective Date of Those Requirements of the Administrative Procedure Act.

The language of Section 12 relied on by the Court of Appeals (R. 998-99) refers to "any agency proceeding initiated prior to the effective date" of the statutory requirement involved. The hearings in petitioner's case, within the meaning of Section 12, were agency proceedings initiated subsequent to the effective date of Section 5(c), namely, September 11, 1946.

a. The "Proceeding" Leading to the Deportation Order Was Not "Initiated" Until the Lodging of the Charges Upon Which That Order Was Based.

The Court of Appeals considered the "proceeding" as "initiated" either by the issuance of the warrant in 1930 or by its service in May of 1946 (R. 990). But neither as issued nor as served did the warrant contain any charge

on which the final deportation order was based. The charges which resulted in the deportation order were not made until after the effective date of the Act. It is both unrealistic and unfair to claim that the "proceeding" was "initiated" before those decisive charges were lodged.

The Court of Appeals sought to meet this difficulty by analogy to Rule 15(c) of the Federal Rules of Civil Procedure, which allows an amendment to "relate back" to the date of an original pleading where the amended claim "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." This analogy will not do. In the first place, even under Rule 15(c), an amended pleading may not relate back to the date of an original pleading if, as of the date of original pleading, the amended cause of action could not have been pleaded. *Momand* v. *Universal Film Exchanges*, 172 F. 2d 37 (C. A. 1st 1948), cert. den. 336 U. S. 967 (1949). In the present case, therefore, the charges under the June 28, 1940 Act could not relate back to the issuance of the warrant in 1930, since at that time those charges could not legally have been made. Secondly, Rule 15(c) is intended to deal with problems raised by statutes of limitations and has no meaningful relation to the present situation. Indeed, where other factors indicate that the literal application of Rule 15(c) will work a hardship, the rule has been described as a "legal fiction" and held inapplicable. *Gerrard* v. *Campbell*, 81 F. Supp. 752 (N. D. Ill. 1949).

More realistic is an analysis of the problem in light of the purpose of Section 12. That section was intended to give the agencies time to adjust to the requirements of the new Act. In the present case, the first hearing was held after the three month adjustment period had elapsed. The controlling charges were lodged for the first time at that hearing. It does violence to logic and fairness and

to the purposes of Congress to permit a government agency to rely upon the technical legal doctrine of "dating back" as an excuse for its failure, in such a case, to comply with the requirements of the Act.

b. The Hearing Was a Separate "Proceeding" in the Course of the "Case", and That "Proceeding" Was Initiated After the Effective Date of the Act.

Moreover, the concept that an "agency proceeding" comprehends all steps from formulation of charges to final order is not a proper one in the interpretation of Section 12.

It is the usual rule in judicial proceedings that "statutes relating to practice and procedure generally apply to pending actions and those subsequently instituted * * *." *Link* v. *Receivers of Seaboard Air Line Ry. Co.*, 73 F. 2d 149, 151 (C. A. 4th 1934); cf. *Hallowell* v. *Commons*, 239 U. S. 506 (1916); *Baltimore and Potomac R. Co.* v. *Grant*, 98 U. S. 398 (1879); *Federal Reserve Bank* v. *Kalin*, 77 F. 2d 50 (C. A. 4th 1935). While it was within the power of Congress to adopt a different rule as to the Administrative Procedure Act, an intention to depart completely from the usual treatment would presumably have been stated in plain terms.

Rule 86(a) of the Federal Rules of Civil Procedure provides that the Rules are to "govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending * * *." Rule 86(b) employs identical language with respect to the effective date of amendments to the Rules adopted by this Court. It will be noted that Rule 86 thus recognizes that there may be a series of "proceedings" in the course of a single "action." To "proceedings" in a pending action completed prior to the effective date of the Rules, the Rules

ceedings" in a pending action the Rules do apply, and the date of "initiation" of the *action* is not necessarily the date of "initiation" of the various *proceedings* in the course of that action.

Rule 86 contemplates that after the effective date of the Rules there may be, in any one action, a series of separate "proceedings," *i. e.*, motions, depositions, interrogatories, and ultimately trial, judgment, and appeal. By applying the new Rules to all such subsequent steps, the anomaly of two concurrent bodies of procedural rules was avoided. By the same token, it was meaningful for the Administrative Procedure Act to provide that where a hearing had been commenced before the effective date of the Act, the law would not require a change of rules, or of examiner, in mid-hearing. In view of the three month grace period, however, the most reasonable interpretation of "agency proceeding," as used in Section 12 of the Act, is one which applies the Act in a manner consistent with accepted judicial rules on the subject. Hearings "initiated" after the expiration of the grace period would therefore become subject to the Act's requirements.

The Administrative Procedure Act was drafted by skilled attorneys, with the participation and advice of bar associations and others thoroughly familiar with the judicial process. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36-45 (1950); see generally, Legislative History, Administrative Procedure Act, S. Doc. 248, 79th Cong. 2d Sess. It seems only fair to assume that when they used the term "proceeding" they used it in no different sense from that applied to the same term in the Federal Rules of Civil Procedure. On this view, therefore, the Administrative Procedure Act does not exempt a long-lasting, single-entity "agency proceeding" merely because some preliminary technicality occurred before the Act became effective.

Moreover, the term "proceeding" was not the term used by the drafters of the Act when they contemplated the over-all continuity of events from inception to final agency action. For example, the Act refers to (1) adjudication of "cases" in Section 5(b); (2) the prosecuting functions of an officer "in any case" in Section 5(c), as distinguished from the more limited concept of counsel in "public proceedings"; (3) appearance in "any proceedings (interlocutory, summary or otherwise)" in Section 6(a); (4) "nonpublic investigatory proceeding" in Section 6(b); and (5) "proceeding for enforcement" of a subpoena in Section 6(c). Section 9(b) provides that "In any *case* in which application is made for a license required by law the agency * * * shall set and complete any *proceedings* required to be conducted pursuant to Sections 7 and 8 of this Act or other *proceedings* required by law and shall make its decision." (Emphasis added.)

Thus it appears clear that the Act envisages various "proceedings" as steps in the handling of a "case"—interlocutory "proceedings", "public proceedings", and "nonpublic investigatory proceedings." And Section 9(b), in recognizing "proceedings" under Sections 7 and 8 as stages in a "case" involving a license application, plainly is referring to hearings.

In brief, if "agency proceeding" is a single entity consisting of all stages from inception to final order, the petitioner's "agency proceeding" could not realistically have been "initiated" before the charges on which he was ordered deported were lodged. If, on the other hand, in accordance with normal judicial patterns, "agency proceeding" refers to any of various procedural steps in the course of the total action, then the hearings in petitioner's case, not having been "initiated" before the effective date of the Act, were not exempt.

3. The Emergency Appropriation Act of September 27, 1950, P. L. 843, Is Not Relevant To This Determination.

The Court of Appeals concluded its discussion of the issue arising under Sections 5(c), 7, and 8 of the Administrative Procedure Act with the statement that the issue had "become of little, if any, significance" because of the enactment on September 27, 1950 of Public Law 843, which exempts deportation proceedings from those requirements of the Act (R. 990-91).

The 1950 Act was, of course, enacted long after these hearings were concluded and while this case was pending in the Court of Appeals. The Court of Appeals did not decide whether this statute could operate retrospectively to make the 1946, 1947, and 1948 hearings lawful if they were otherwise unlawful under then applicable law. It must be assumed, however, that the validity of those hearings is to be determined by the law in effect at the time the hearings were held, and that Congress could not several years later "legalize" them if they were in fact unlawful.

Nor is it true that the issue of the lawfulness of the hearings has lost "significance" because new hearings on remand would be conducted according to the newly enacted law. Such an observation by the Court of Appeals assumes the validity of the 1950 statute and of any hearings conducted pursuant to it. That no such assumption is warranted is demonstrated immediately below under Point B.

A litigant's day in court, moreover, entitles him to a hearing before a tribunal properly constituted under the law then in effect. He ought not to be deprived of that right by casual reference to a statute "legalizing" after the fact a hearing otherwise improper. Cf. *Cole* v. *Arkansas*, 333 U. S. 196 (1948).

B.

Petitioner's Hearing Failed To Meet Constitutional Standards of Due Process of Law.

Regardless of whether the Administrative Procedure Act applied, the hearings accorded petitioner failed to meet constitutional standards of due process of law. In considering this issue, it is to be noted that the Government has conceded (Brief in Opposition to Petition for Writ of Certiorari, p. 10, n. 7) that "the procedure adopted by the Government against the alien present in this country to carry out the decision to terminate his residence must accord with procedural due process."

This Court has recently analyzed at length the deportation procedures employed by the Immigration and Naturalization Service. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950).

After reviewing the evils to which the Administrative Procedure Act was addressed, this Court observed that the deportation hearing under consideration was "a perfect exemplification of the practices so unanimously condemned." The Wong Yang Sung hearing thereupon described is strikingly similar to the hearings accorded petitioner here. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 45-46 (1950).

Founded as it is on requirements of basic fairness, due process of law undoubtedly has room within its broad outlines for some adjustment to the growth of national concepts of proper procedures. A fair tribunal is one that accords with "at least currently prevailing standards of impartiality." *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50 (1950).

The commingling of inconsistent roles in the officer who

exercises the adjudicating function is properly abhorrent to our constitutional scheme. This Court denounced the assignment of judicial functions to an officer who, in another capacity, had an official concern favorable to a finding of guilt. *Tumey* v. *Ohio*, 273 U. S. 510 (1927). The personal pecuniary interest of the judge in the outcome of the trial in the *Tumey* case was only one basis for this Court's finding of a denial of due process. Equally offensive was the fact that the judge, in his dual role as Mayor, had a separate official concern in the possible benefit the community would derive from the outcome. "No matter what the evidence was against him, he [the defendant] had the right to have an impartial judge." *Tumey* v. *Ohio*, 273 U. S. 510, 535 (1927).

One of the reasons advanced by Mr. Justice Rutledge for considering unconstitutional the Michigan one-man grand jury was the fact that it combined "in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury." *Re Oliver*, 333 U. S. 257, 278 (1948). In *Morgan* v. *United States*, 304 U. S. 1, 22 (1938), the fact that the Secretary of Agriculture, in making the decision of the agency, consulted *ex parte* with subordinate officials was not all that posed the constitutional issue; also significant was the Secretary's acceptance of findings "prepared by the active prosecutors for the Government * * *."

It is no answer to suggest that the procedures condemned by the proponents of the Administrative Procedure Act and by this Court have long been in effect. Invasion of constitutional rights does not obtain validity by prescription. Systematic exclusion of Negroes from jury panels was undoubtedly a venerable practice in certain communities before struck down by this Court. *Strauder* v. *West Virginia*, 100 U. S. 303 (1880); *Norris* v. *Alabama*, 294 U. S. 587 (1935); *Hill* v. *Texas*, 316 U. S. 400 (1942).

Deportation procedures deserve the same close scrutiny as any other, and if they fail to meet proper standards, they should be invalidated. *Kwock Jan Fat* v. *White*, 253 U. S. 454 (1920); *Chin Low* v. *United States*, 208 U. S. 8 (1908). "It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake." *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50-51 (1950).

II.

THE ACT OF OCTOBER 16, 1918 AS AMENDED, AS APPLIED TO PETITIONER, DENIES HIM FREEDOM OF SPEECH AND ASSEMBLY GUARANTEED BY THE FIRST AMENDMENT, AND DEPRIVES HIM OF LIBERTY WITHOUT THE DUE PROCESS OF LAW REQUIRED BY THE FIFTH AMENDMENT TO THE CONSTITUTION.

A.

As An Alien Who Entered the Country Legally, Petitioner Is Entitled To the Protections of the First and Fifth Amendments to the Constitution.

The petitioner, a Greek national, was legally admitted to the United States with his father in 1916 (R. 21, 104-05), and has resided here ever since (R. 21-22). It would seem beyond question that, as an alien lawfully resident in the United States, petitioner is entitled to the constitutional protections of free speech and assembly and of due process of law. Yet the Court of Appeals suggest that the constitutional rights of aliens are somehow less vigorous than those of citizens, the alien's permit to remain being revocable at the sovereign's will (R. 992). And the Government, in this Court, apparently adheres to the same view (Brief in Opposition to Petition for Writ of Certiorari, p. 16).

The basis for this position is the concept that the sovereign can admit or exclude aliens on such terms and conditions as it chooses to adopt. It therefore can deport any alien previously admitted, since the alien's admission in the first place was by revocable license only. Quite plainly, there is language in this Court's opinions in support. See *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707-11, 723-24, 728-29 (1893); *Tiaco* v. *Forbes*, 228 U. S. 549, 556-57 (1913); *Mahler* v. *Eby*, 264 U. S. 32, 38-40 (1924).

At the same time, however, this Court has insisted upon fair procedures in connection with deportation. *Chin Low* v. *United States*, 208 U. S. 8 (1908); *Kwock Jan Fat* v. *White*, 253 U. S. 454 (1920). It has stated that aliens within the territory of the United States are entitled to the protection of basic constitutional guarantees. *Wong Wing* v. *United States*, 163 U. S. 228, 238 (1896); *Lem Moon Sing* v. *United States*, 158 U. S. 538, 547 (1895). It has invalidated state enactments unreasonably discriminatory against aliens. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Truax* v. *Raich*, 239 U. S. 33 (1915); *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410 (1948).

There is certainly no reason why statutes enacted by Congress pursuant to its power to control immigration are not required to meet constitutional tests applicable to other acts of Congress. Even if it be conceded that aliens may somehow be dealt with more summarily and under less exacting guaranties than citizens, it does not follow that Congress completely frees itself from constitutional control once it enters upon the regulation of aliens. Cf. *Keller* v. *United States*, 213 U. S. 138 (1909); *Jordan* v. *DeGeorge*, 341 U. S. 223 (1951).

In fact it is most improbable that a court today would uphold deportation proceedings of the kind sanctioned in

Fong Yue Ting v. *United States*, 149 U. S. 698 (1893), or if it did, that it would rest its decision on the theory that the power to deport and the power to exclude are the identical-twin offspring of sovereignty. For that view requires the subordination of the guaranties of the Bill of Rights to the plenary power of Congress over aliens. It means that while Congress supposedly cannot abridge freedom of speech, it can deport aliens who seek to exercise that freedom. It means that while Congress supposedly cannot punish persons for crimes expressed in language so vague as to give the individual no measure or standard of lawful conduct, it can deport aliens for activities expressed in the most general way or not at all. It means that while the use of other Congressional powers must bear some reasonable relationship to the purpose for which granted, the power to deport can be exercised for a capricious purpose or for none. It means that while Congress cannot disregard traditional requirements that guilt be personal, it can deport for association or less.

"Freedom of speech and of press is accorded aliens residing in this country." *Bridges* v. *Wixon*, 326 U. S. 135, 148 (1945); *Bridges* v. *California*, 314 U. S. 252 (1940). That freedom is indeed precarious if its exercise in a fashion displeasing to Congress means that the alien seeking to exercise it may suddenly be ejected from the territory in which that freedom prevails. Revocation of the license to remain, if such a license is all the alien obtains, excludes him from the benefits of the Constitution. If revocation is based on activities protected by the Constitution, it is difficult not to conclude that, for an alien, the exercise of constitutional rights may lead to their extinguishment. So-called rights dependent upon a license which the sovereign may revoke at will are in reality no rights at all.

B.

These Protections of the Constitution Cannot Be Impaired By the Attaching of Conditions to the Alien's Admission and Residence Which In Themselves Violate the Constitution.

While it may be that the power of Congress to exclude is absolute, such power would not permit the imposition of conditions which subject the alien, after admission, to unconstitutional discriminations and restraints. For once the decision is made to admit rather than to exclude, the alien acquires rights under the Constitution he did not possess before. He cannot then or thereafter be deprived of them, even if it be assumed that at one time he could have been denied entry out of hand.

Unless this distinction be made, unless the alien without and the alien within be treated separately, it is apparent that Congress might pass laws abridging the freedom of speech of aliens, even though the Constitution forbids all such laws, and depriving aliens of liberty and property without due process of law, even though no person's liberty or property can constitutionally be taken in such fashion. Plainly, if aliens are to have the substance of constitutional rights, and not merely their shadow, Congress cannot legislate as to deportation as though it were merely making effective its power to exclude. The two powers are not the same; their scope is different, and they must be judged by different constitutional standards.

In this connection, the decisions of this Court with respect to the right of one state to exclude corporations chartered by another present a pertinent analogy. A state may bar foreign corporations for any reason or for none. It may impose legitimate conditions upon entry. It may not, however, exact as a condition of a corporation's doing

business within its borders the acceptance of burdens prohibited by, or the surrender of rights guaranteed by, the federal Constitution. *Hanover Fire Ins. Co.* v. *Carr*, 272 U. S. 494, 507-08 (1926); *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1 (1910). Nor may a state revoke the license of a foreign corporation to do business within the state because, while so engaged, it exercises its right to remove a law-suit against it to the federal court sitting in the state. *Terral* v. *Burke Construction Co.*, 257 U. S. 529 (1922). What is more, the acceptance of the license to do business does not impose any obligation upon the corporation, by estoppel or otherwise, to comply with the unconstitutional requirements. *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490 (1927). As said in *Frost* v. *Railroad Commission*, 271 U. S. 583, 594 (1926), in reply to the argument that the state could compel the surrender of constitutional rights as a condition of its favor, "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Here, then, despite the existence of an absolute state power to exclude, despite the grant to the foreign corporation of no more than a license to do business within the state, and despite the right of the state to impose conditions upon the grant of such a license and to revoke for their non-observance, the state cannot exercise that power to impose unconstitutional burdens or require the surrender of constitutional rights. "A constitutional power cannot be used by way of condition to attain an unconstitutional result." *Western Union Tel. Co.* v. *Foster*, 247 U. S. 105, 114 (1918).

The powers granted to Congress by the Constitution are subject to a similar limitation. The power to regulate commerce, when used to grant privileges, cannot be employed to exact unconstitutional requirements as a condition of the

grant. *United States* v. *Chicago M. St. P. & P. R. Co.*, 282 U. S. 311, 328-31 (1931).

There is no valid reason why the same principle is not applicable to the Congressional power to control immigration. Even if Congress may exclude absolutely, it may not admit subject to unconstitutional conditions. Like all powers exercised over persons subject to the Constitution, the power to deport must be employed in conformity with the limitations of the Constitution. To exclude an alien who has never entered the country is not a comparable function. Since the Constitution does not have extraterritorial operation, such an alien is entitled to none of its benefits. Cf. *Chae Chan Ping* v. *United States* (The Chinese Exclusion Case), 130 U. S. 581 (1889); *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950).

C.

The Act of October 16, 1918 As Amended Deprives Petitioner of the Freedom of Speech and Assembly Guaranteed By the First Amendment.

The petitioner was admittedly an active member of the Communist Party from 1925 to 1939. The Board of Immigration Appeals found that the evidence did not establish that petitioner personally believed in or advocated the forcible overthrow of the government (R. 873). Consequently, it is plain that petitioner was ordered deported only because of membership in the Communist Party, an organization which was not illegal when he belonged to it, membership in which was not a crime, and which has never been found by this Court to be one of the organizations proscribed by the Act of October 16, 1918 as amended. Cf. *Schneiderman* v. *United States*, 320 U. S. 118, 148 (1943).

In this connection it should be noted that only certain

parts of the Act of October 16, 1918 as amended require what may be termed *scienter* on the part of the alien. Cf. *United States ex rel. Tisi v. Tod*, 264 U. S. 131, 133 (1924). Paradoxically those are the provisions relating to an alien who writes or publishes forbidden doctrine or possesses or distributes forbidden literature. 8 U. S. C. § 137 (d). Yet where the conduct is more vicarious, *i. e.*, membership in or affiliation with a proscribed organization, *scienter* is not required. 8 U. S. C. § 137 (c) and (e).

"The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws * * *" *Jones* v. *Opelika*, 316 U. S. 584, 609 (1942). Freedom of speech and freedom of assembly are "cognate rights * * * united in the First Article's assurance." *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945); *De Jonge* v. *Oregon*, 299 U. S. 353, 364 (1937).

The *De Jonge* decision announces the basic principle that should govern here: the right of peaceable assembly cannot be abridged by making it the basis for a criminal charge. The assembly there was sponsored by the Communist Party, and although it was assumed that the party advocated violence, the individual participant was held to retain full enjoyment of his constitutional rights. Similarly in *Herndon* v. *Lowry*, 301 U. S. 242 (1937), the defendant's membership in the Communist Party and solicitation of new members were not enough to warrant finding incitement to insurrection. A statute construed to make such activity criminal was therefore held in the *Herndon* case to be an improper invasion of the right of free speech. Cf. *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716, 723-24 (1951); *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56 (1951).

Thus, as in *Bridges* v. *Wixon*, 326 U. S. 135, 147-48 (1945), petitioner's activities were protected by the First

Amendment. There is no showing here, as there was none there, that the petitioner personally advocated force and violence or distributed literature advocating such means. A record barren of personal advocacy of force and violence would admittedly be insufficient to support denaturalization. *Schneiderman* v. *United States*, 320 U. S. 118 (1943); *Baumgartner* v. *United States*, 322 U. S. 665 (1944). It is difficult to see how a like record can justify the equally drastic penalty of deportation.

Such a restraint upon an individual's rights of free speech and assembly could be justified only if there were a clear and present danger that his utterances would result in a substantial public evil. *American Communication Association* v. *Douds*, 339 U. S. 382, 412 (1950); *Dennis* v. *United States*, 341 U. S. 494, 505-10 (1951); cf. *Terminiello* v. *Chicago*, 337 U. S. 1, 4-5 (1949). Yet the elements present here, as contrasted with those in the *Douds* and *Dennis* cases, emphasize how tenuous the relationship is between the means employed and the end sought to be achieved.

To direct legislation at the substantive evils to commerce occasioned by a relative handful of men presently holding key union positions, or at a conspiracy now readying itself for violent overthrow of the Government represents legislative aim which is pin-point in its accuracy when compared to the shot-gun coverage of past activity here involved. For the deportation laws conclusively presume that every alien who has ever been a member of a proscribed organization, however briefly or long ago, is thereby such a source of danger to the Republic that he must be banished, regardless of what he personally thought and advocated then or thinks and advocates now. See H. Rep. 2683, 79th Cong. 3d Sess., at page 9; remarks of Congressman Hobbs, 86 Cong. Rec. 9031-32, 76th Cong. 3d Sess., June 22, 1940. Such a departure from the ex-

press command of the First Amendment does not meet the clear and present danger test even at its broadest.

Unlike the affidavit requirements considered in *American Communication Association* v. *Douds*, 339 U. S. 382, 404 (1950), the Act of October 16, 1918 as amended does not permit the alien to maintain his affiliations, subject only to loss of office. He can continue his affiliations, but only at the cost of expulsion from the country. Even if his beliefs and utterances be unexceptionable, he can remain only if he avoids joining organizations which the Immigration and Naturalization Service may one day find to be proscribed. Should he adapt himself sufficiently to American ways to become a "joiner," he may find himself deprived of all opportunity to complete the process. For the "desirable" alien, almost by definition, is a most prudent man: he is orthodox in view, reticent, and above all nongregarious. Cf. *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943).

D.

The Act of October 16, 1918 as Amended Makes Past Membership in a Proscribed Organization Conclusive Proof of Present Undesirability, Thereby Creating an Unreasonable Standard in Violation of the Due Process Clause of the Fifth Amendment.

The Court of Appeals concedes that the statute must have some rational relation to the public welfare (R. 993). So does the Government in this Court (Brief in Opposition to Petition for Writ of Certiorari, p. 10). But the test is more exacting. Congress may regulate within reasonable limits the political activities of government employees. *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947). It may regulate interstate commerce by methods not shown to be clearly arbitrary. *United States* v. *Caro-*

lene Products Co., 323 U. S. 18 (1944). But it cannot regulate commerce or further the public welfare, consistently with the Fifth Amendment, by creating a statutory presumption "if there be no rational connection between the fact proved and that ultimate fact presumed." *Tot* v. *United States*, 319 U. S. 463, 467-68 (1943). Nor can proper legislative ends, such as the regulation of schools or the collection of taxes, be attained at the cost of unreasonable discriminations and restraints. Cf. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Yu Cong Ed* v. *Trinidad*, 271 U. S. 500 (1926).

Admittedly the line is a difficult one to draw, particularly with respect to alien legislation. For aliens in some sense constitute a classification of persons that for some purposes may be treated separately in legislative enactments. Nonetheless, the same general principles of due process of law apply to Congress' power to regulate immigration. *Keller* v. *United States*, 213 U. S. 138 (1909).

Here the statutory scheme creates an irrebuttable presumption that past membership in a proscribed organization is the equivalent of present undesirability. The inference is not left to administrative determination. Cf. *Mahler* v. *Eby*, 264 U. S. 32 (1924). It is indelibly imbedded in the statute itself; there is no way of avoiding it. Individual and temporal differences which might make the inference proper in one case and improper in another are legislatively declared irrelevant. The Court of Appeals asserts that the weighing of such differences would impose a "difficult and uncertain task" upon deportation officials (R. 993). Doubtless it would, and if nothing but administrative convenience were to be considered the requirement of a fair hearing might well be dispensed with.

The issue, however, is one of constitutional limitation. In protecting the country from dangerous aliens Congress cannot make an indiscriminate coverage of past activities

a conclusive test of present undesirability. As applied to an individual alien, that test deprives him of due process of law. Cf. *Cummings* v. *Missouri*, 4 Wall. 277, 319 (1867); *Ex parte Garland*, 4 Wall. 333, 380 (1867).

E.

The Act of June 28, 1940 Retrospectively Deprives Petitioner of His Right To Remain In the Country and Therefore Denies Him Due Process of Law Under the Fifth Amendment.

Petitioner has been ordered deported under the Act of June 28, 1940, for membership which ceased in 1939, approximately eight months before that statute took effect. As appears in Point III. C. below, the application of this Act to petitioner is retrospective and *ex post facto*. The retrospective character of the Act's application also violates the due process clause of the Fifth Amendment.

Retrospective laws depriving persons of property rights have not been viewed with favor by this Court. Cf. *Stewart* v. *Keyes*, 295 U. S. 403 (1935); *Untermyer* v. *Anderson*, 276 U. S. 440 (1928). In such cases, of course, there were rights which could be described as vested, whereas here, so the Government urges, the alien has no vested right to remain in the country (Government Brief in Opposition to Petition for Writ of Certiorari, p. 9). This contention is but another form of the revocable license argument upon which the Government chiefly relies.

Petitioner was subject to deportation under then existing law during the period of his membership in the Communist Party. When his membership terminated in 1939, however, his status as a deportable came to an end. *Kessler* v. *Strecker*, 307 U. S. 22 (1939). In effect, then, his right to remain became vested, providing only that he did not thereafter join a proscribed organization. To divest peti-

tioner of this right by retrospective legislation is a denial of due process of law. As Judge Learned Hand said of another alien, "he had a vested interest in his residence, which could not be impaired so long as he avoided another conviction." *DiPasquale* v. *Kamuth*, 158 F. 2d 878, 879 (C. A. 2d 1947). Cf. *Del Guercio* v. *Gabot*, 161 F. 2d 559 (C. A. 9th 1947).

III.

THE ORDER FINDING PETITIONER DEPORTABLE UNDER THE ACT OF OCTOBER 16, 1918 AS AMENDED BY THE ACT OF JUNE 28, 1940, BECAUSE OF PAST MEMBERSHIP IN THE COMMUNIST PARTY, IS INVALID, SINCE AS APPLIED TO PETITIONER THE 1940 ACT CONSTITUTES AN EX POST FACTO LAW.

The Act of June 28, 1940 provides for the deportation of "Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated * * *." Its purpose was to make possible the deportation of an alien for past membership in a proscribed organization, and more particularly to facilitate the deportation of Harry Bridges. See *Bridges* v. *Wixon*, 326 U. S. 135, 157-59 (1945); Note, *In re Harry Bridges*, 52 Yale L. J. 108, 109-10 (1942). The immigration laws theretofore in effect had been construed as providing for deportation by reason of present membership only. *Kessler* v. *Strecker*, 307 U. S. 22 (1939).

Petitioner's membership in the Communist Party terminated in October of 1939 (R. 46, 850). The Assistant Commissioner, in his opinion of December 16, 1948, found that petitioner was deportable, not for present membership in a proscribed organization, but for past membership (R. 852). The deportation order was affirmed by the Board of Immigration Appeals on the ground that

the petitioner had been, subsequent to his entry into the United States, a member of an organization which advocated the overthrow of the government by force and violence and which distributed literature advocating such overthrow (R. 873).

When petitioner ceased to be a member of the Communist Party in October of 1939, he became non-deportable under the then law relating to membership. *Kessler* v. *Strecker*, 307 U. S. 22 (1939). Save for the Act of June 28, 1940, therefore, the order of deportation could not stand. That Act, passed approximately eight months after petitioner's membership terminated, rendered petitioner deportable, not for what he was then doing and subsequently might do but solely for what he had previously done.

A.

The Ex Post Facto Prohibition of the Constitution Applies To Punitive Laws and Not Exclusively to Criminal Statutes.

Article I, Section 9, clause 3 of the Constitution provides that "No Bill of Attainder or *ex post facto* Law shall be passed."

The classic expression of the scope and application of this clause is *Calder* v. *Bull*, 3 Dall. 386 (1798). There Mr. Justice Chase, in construing the *ex post facto* clause applicable to states, Article I, Section 10 of the Constitution, held that it did not provide any protection with respect to property or contract rights. "The prohibition, in the *letter*," he wrote at page 390,

> is not to pass any law *concerning and after the fact;* but the plain meaning and intention of the prohibition is this; *that the Legislatures of the several states shall not pass laws, after a fact done by a subject, or*

citizen, which shall have relation to such fact, and shall punish him for having done it.

While this decision might seem to restrict the *ex post facto* clause to criminal statutes, subsequent opinions of this Court indicate that it also applies to non-criminal statutes retrospectively imposing a penalty or punishment. Thus the famous test-oath cases, *Cummings* v. *Missouri*, 4 Wall. 277 (1867), and *Ex parte Garland*, 4 Wall. 333 (1867), invalidated, as bills of attainder *and* as *ex post facto* laws, statutes barring persons from particular occupations unless they stated on oath that they had not in the past engaged in certain activities and entertained certain beliefs. In so holding, Mr. Justice Field expressed views as to the meaning of punishment sufficiently broad to include deportation. "The deprivation of any rights, civil or political, previously enjoyed, may be punishment * * *. Disqualification from office may be punishment * * *." He also quoted Blackstone to the effect that punishment may consist "in exile or banishment, by abjuration of the realm or transportation." *Cummings* v. *Missouri*, 4 Wall. 277, 321 (1867). Cf. *Pierce* v. *Carskadon*, 16 Wall. 234 (1873). See 1 Cooley, Constitutional Limitations, 544-45 (8th ed. 1927).

B.

Deportation, Although Not Technically Punishment For a Crime, Is Nonetheless Punitive, Since, By Depriving a Person of All Opportunity To Remain In the United States, It May Separate Him From Family, Livelihood, and Property.

Concedely, this Court has stated that deportation is not punishment. *Bugajewitz* v. *Adams*, 228 U. S. 585, 591 (1913); *Mahler* v. *Eby*, 264 U. S. 32, 39 (1924); *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730 (1893).

More recently, however, it has had occasion to recognize the punitive nature of deportation. *Bridges* v. *Wixon*, 326 U. S. 135, 147 (1945); *Delgadillo* v. *Carmichael*, 332 U. S. 388, 391 (1947); *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10 (1948); *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50 (1950). These later statements would seem much more in accord with the harsh realities involved. To deport a mature man who has lived in this country since the age of thirteen, married, and fathered two children here may well be to take from him "all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U. S. 276, 284 (1922).

Certainly, if "permanent proscription from any opportunity to serve the Government" constitutes a severe punishment, *United States* v. *Lovett*, 328 U. S. 303, 316 (1946), banishment from the country after a residence of thirty-five years is a punishment no less severe. As Judge Learned Hand has written, "nothing can be more disingenuous than to say that deportation in these circumstances is not punishment." *DiPasquale* v. *Kamuth*, 158 F. 2d 878, 879 (C. A. 2d 1947). The Court of Appeals for the Ninth Circuit, after quoting Judge Hand's language with approval, declined to give retrospective application to a statute, which, if so applied, would have required deportation. *Del Guercio* v. *Gabot*, 161 F. 2d 559, 561 (C. A. 9th 1947).

Recognition of the practical identity between deportation and punishment for a crime apparently led the Court, in *Jordan* v. *DeGeorge*, 341 U. S. 223, 231 (1951), to test the constitutionality of a deportation statute under the due process requirement of definiteness applicable to criminal enactments. Cf. *Williams* v. *United States*, 341 U. S. 97, 100 (1951); *Herndon* v. *Lowry*, 301 U. S. 242, 261-64 (1937).

The position taken by the Government that deportation is not punishment (Brief in Opposition to Petition for

Writ of Certiorari, p. 8) rests primarily upon language employed in *Fong Yue Ting* v. *United States*, 149 U. S. 698 (1893). The argument runs like this: The power to exclude or deport aliens is an absolute and unqualified power which may be employed in such fashion and upon such occasions as Congress decides. Consequently, the deportation of an alien is in no sense punishment. It is simply the exercise of the sovereign's inherent right to terminate the alien's license to remain, a license at all times subject to summary revocation. The resulting hardship to the alien is purely incidental, an unfortunate by-product of plenary power.

This argument did not have the assent of all the Justices of this Court when advanced in 1893. See *Fong Yue Ting* v. *United States*, 149 U. S. 698, 732, 744, 762 (1893). Insofar as it equates for all purposes the power to exclude with the power to deport, it has long since been out of tune with the law. *Yamataya* v. *Fisher* (The Japanese Immigrant Case), 189 U. S. 86, 100-01 (1903). Even when applied to an alien seeking admission to this country for the first time, it would appear to give rise to misgivings now. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 547, 550 (1950).

Assuming for the sake of argument that such unlimited power can constitutionally exist, it by no means follows that its impact upon individuals is only an incidental result. Necessarily, if the purpose of the power is to rid society of undesirables, it must somehow single out those undesirables and separate them from the society. Undesirable aliens are forcibly removed from society because they are found to be undesirable. In like fashion society is safeguarded from other undesirables, such as sexual psychopaths and habitual criminals. Whatever the source of the power employed, it achieves its purpose through the application of compulsion to men and women.

The controlling characteristic, then, is not the source or claimed plenary nature of the power, but the manner of its incidence upon individuals. So viewed, deportation is punishment.

C.

As Applied To Petitioner, the Act of June 28, 1940 Is Retrospective, Since It Relates to Activities Which Took Place Prior To Its Enactment and Seeks To Extend Indefinitely the Time In Which Deportation Proceedings Based Upon Those Activities Might Be Initiated.

An *ex post facto* law is of necessity retrospective. *Calder* v. *Bull*, 3 Dall. 386 (1798). Its peculiar vice is that it permits or facilitates the imposition of punishment for acts that occurred before the law was enacted. Thus a Missouri constitutional provision abrogating the rule that conviction and sentence for second degree murder amounted to an acquittal of, and prevented a subsequent trial for, first degree murder was *ex post facto* as to a crime committed prior to its adoption. Such a change in the law, in the view of this Court, took from the accused a defense to which he was entitled under the law in effect at the time of his offense. *Kring* v. *Missouri*, 107 U. S. 221 (1883). Cf. *Ex Parte Medley*, 134 U. S. 160 (1890); *Lindsey* v. *Washington*, 301 U. S. 397 (1937); *Thompson* v. *Utah*, 170 U. S. 343 (1898).

These cases hold that a punitive statute is retrospective *and* therefore *ex post facto* if it changes the law to the disadvantage of an accused who committed the acts complained of before the statute was enacted. Necessarily, then, if the statute of limitations applicable to a crime has run, it cannot thereafter be extended so as to authorize a prosecution already barred. The opinion of Mr. Justice Miller in *Kring* v. *Missouri*, 107 U. S. 221, 231-34 (1883),

leaves no doubt as to this. In fact, upon analysis, it is apparent that the effect of the constitutional provision there held to be *ex post facto* was to remove an existing bar to prosecution. See 1 Cooley, Constitutional Limitations, 543 n. 1 (8th ed. 1927). Cf. *Stewart* v. *Keyes*, 295 U. S. 403 (1935).

It is the gap in time between the act affected and the statute affecting it which makes for the retrospective effect. *United States* v. *Powers*, 307 U. S. 214 (1939); *Kring* v. *Missouri*, 107 U. S. 221, 225-26 (1883). Any lapse of time between the act and the passage of the statute involved, no matter how short, is a hiatus which cannot be bridged retrospectively. *Burgess* v. *Salmon*, 97 U. S. 381 (1878). And where this Court has held that certain criminal laws have been repealed, a later statute purporting to continue those laws in effect cannot retrospectively permit conviction for acts committed prior to its enactment. *United States* v. *Stafoff*, 260 U. S. 477 (1923).

Kessler v. *Strecker*, 307 U. S. 22 (1939), held that termination of membership in a proscribed organization barred deportation under existing law. In other words, to deport for membership under the Act of October 16, 1918 as amended by the Act of June 5, 1920, the government had to take action while the alien was a member. Action taken after the alien had ceased to be a member came too late.

The Act of June 28, 1940 was intended to remove that time limitation. As amended, the statute authorized deportation for membership entered into at any time after entry, regardless of whether terminated or not. In practical effect, then, the Act of June 28, 1940 extended the time in which action to deport might be taken: before the Act it had to be *during* membership; by virtue of the Act it could be *during or after membership.*

To use this statute to deport an alien whose membership in a proscribed organization terminated prior to its enactment is clearly to punish retrospectively. So applied, it is *ex post facto* in the same fashion as a statute which, by extending the statute of limitations, attempts to revive prosecutions already barred. In each instance, the controlling factor is the hiatus, and it is that which distinguishes *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716 (1951), where, in the Court's view, no such hiatus existed.

D.

Previous Statements of This Court That the Ex Post Facto Clause Has No Application To Deportation Statutes and That Such Statutes May Operate Retrospectively Are Not Controlling.

Judge Swan, for the Court of Appeals, disposed of the *ex post facto* argument in one sentence (R. 993): "Nor is it a valid objection that the ground of deportation is an act that occurred before the statute was adopted. See *Mahler* v. *Eby*, 264 U. S. 32, 39."

Mahler v. *Eby*, 264 U. S. 32 (1924), involved the Act of May 10, 1920, which provided for the deportation of aliens of certain described classes if the Secretary of Labor found, after hearing, "that such aliens are undesirable residents of the United States." The classes included aliens convicted of violating the Selective Service Act and the Espionage Act. In 1918, Mahler and several other aliens were convicted of violating those acts. While their imprisonment was pending, they were arrested on deportation warrants issued under the Act of May 10, 1920. They thereupon brought habeas corpus proceedings, contending, among other things, that the Act of May 10, 1920, as applied to them, was an *ex post facto* law. The trial court dismissed the writs.

Mr. Chief Justice Taft, for the Court, stated that the *ex post facto* inhibition had no application, citing *Johannessen* v. *United States*, 225 U. S. 227 (1912), and *Bugajewitz* v. *Adams*, 228 U. S. 585 (1913). But the decision is not a holding on that point, since the Act of May 10, 1920, as interpreted, had no retrospective effect. As a prerequisite to an order of deportation the Act called for a finding that the aliens were "undesirable residents of the United States." And the absence of such a finding as required by statute was held to be a jurisdictional defect compelling reversal for further proceedings, even though the Secretary of Labor did find that the aliens had been convicted under the statutes specified.

Thus the Court construed the Act of May 10, 1920 as authorizing the deportation, not of all members of a class, *i. e.*, aliens convicted of certain offenses, but only of those within the class who were found by the Secretary of Labor to be undesirable residents. *Mahler* v. *Eby*, 264 U. S. 32, 40 (1924). In consequence, the Court declined to imply the missing jurisdictional finding of present undesirability, while conceding that evidence of a prior conviction would be, under the statute, sufficient to support such a finding. Cf. *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U. S. 521 (1950), where there were the requisite findings of present undesirability. The Act of June 28, 1940, however, requires no finding of present undesirability.

Johannessen v. *United States*, 225 U. S. 227 (1912), cited by Mr. Chief Justice Taft, held retrospective but not *ex post facto* a statute providing for denaturalization of citizens who obtained their citizenship fraudulently or illegally. The Court viewed the statute, not as one imposing punishment, but simply as one depriving the alien of a privilege that never was rightfully his. Consequently,

the *Johannessen* opinion, if pertinent at all, should be confined to deportation cases where the aliens involved entered the country illegally. Cf. *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 292 (1904). Such is plainly not the case here. In *Bugajewitz* v. *Adams*, 228 U. S. 585 (1913), also cited by Mr. Chief Justice Taft, Mr. Justice Holmes stated that the statute before the Court need not be construed as having any retrospective effect. Nor was retrospective effect given to the statutory provisions involved in *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922). Cf. *Murphy* v. *Ramsey*, 114 U. S. 15, 43 (1885).

The issue, then, has not been foreclosed by prior decisions of this Court.

CONCLUSION.

For the foregoing reasons, it is submitted that the judgment should be reversed with directions that the writ of habeas corpus issue.

Respectfully submitted,

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